No. 85-505

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

KENNETH M. ZOELLER, - - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

C. FRED PARTIN
Attorney-at-Law
1926 Kentucky Home Life Building
239 S. Fifth Street
Louisville, Kentucky 40202
(502) 589-5051

Counsel for Petitioner,
Kenneth M. Zoeller

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

I. Whether the Petitioner was denied a speedy trial by the unreasonable delays which were not attributable to him, but rather, were occasioned solely by his Co-Defendants.

II. Whether the trial court erroneously excluded, on cross-examination, inquiries into specific instances of conduct of the government's key witness.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

KENNETH M. ZOELLER, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, KENNETH M. ZOELLER, by counsel, respectfully prays that a Writ of Certiorari issue to review the Judgment and Decision of the United States Court of Appeals for the Sixth Circuit rendered June 25, 1985.

OPINION BELOW

The Judgment and Decision of the United States Court of Appeals for the Sixth Circuit is unpublished. A copy thereof may be found in Appendix A.

JURISDICTION

The unpublished Judgment and Decision of the United States Court of Appeals for the Sixth Circuit was rendered and filed on June 25, 1985. The Order of the United States Court of Appeals for the Sixth

Circuit overruling Petitioner's Petition for Rehearing was entered on August 9, 1985. A Copy thereof may be found in Appendix B. This Petition for Writ of Certiorari was filed within sixty (60) days of that date. Jurisdiction is invoked under the authority of Title 28, United States Code, Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed by the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

The statute involved here is Title 18, United States Code, Section 3161, and the rule involved is Rule 608, Federal Rules of Evidence.

STATEMENT OF THE CASE

The Petitioner was convicted by the United States District Court for the Western District of Kentucky at Louisville of conspiring to distribute cocaine, in violation of Title 21, United States Code, Section 846(a)(1); possession with intent to distribute cocaine,

in violation of Title 21, United States Code, Section 841; and use of a firearm to commit a felony, in violation of Title 18, United States Code, Section 924(c)(1).

Petitioner was indicted with two Co-Defendants, one of whom was acquitted, and the other of whom entered a plea of guilty eight (8) months prior to Petitioner's trial. The Co-Defendant who plead guilty was not formally sentenced for nine (9) months, this extended period being excluded from Petitioner's Speedy Trial clock.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, advancing two grounds for reversal of his conviction. The first contention on appeal was that the delays attributable to his Co-Defendants, and particularly to the "effectively severed" pleading Co-Defendant, resulted in his not having been tried within the statutorily mandated seventy (70) day time frame of the Speedy Trial Act, Title 18, United States Code, Section 3161(c)(1). The Court of Appeals, however, dispensed with Petitioner's Speedy Trial claim by holding that "[A] delay attributable to one defendant is chargeable to all." Page 4a, Appendix A.

The second point which Petitioner argued on direct appeal was that the trial court substantially prejudiced his right to effectively cross-examine the prosecutor's primary witness by forbidding a defense inquiry into a specific instance of conduct which bore directly on the government's witness' character for untruthfulness. The Sixth Circuit Court of Appeals

ruled that since the proffered testimony would have been both time-consuming and potentially confusing to the jury, the trial court did not abuse its discretion in refusing to permit the evidence. Pages 9a-10a, Appendix A.

A Petition for Rehearing was filed and denied (Appendix B), and this Petition for Writ of Certiorari was filed within sixty (60) days thereof.

REASONS FOR GRANTING THE WRIT

The Decision of the United States Court of Appeals for the Sixth Circuit (Appendix A) clashes with decisions of at least three state courts of last resort. Additionally, the Speedy Trial issue is of such general importance that there is a genuine need for uniform and controlling guidelines by this Court. *Fields* v. *United States,* 205 U. S. 292, 51 L. Ed. 807, 27 S. Ct. 543 (1907).

I. The Delay Attributable to Petitioner's Co-Defendants Should Not Have Been Excluded from the Speedy Trial Clock as to Petitioner.

Petitioner was indicted along with two Co-Defendants. It was because of these Co-Defendants, and not because of any fault of his own, that Petitioner was not tried within the seventy (70) day time requirement of Title 18, United States Code, Section 3161(c)(1).

The Decision below held that where multiple defendants are charged on an indictment and no motion for severance has been granted, there is only one "Speedy Trial clock" for all defendants. "A delay

attributable to one defendant," stated the Court, "is chargeable to all." Cited for authority were *United States* v. *Dennis,* 737 F. 2d 617 (CA 7, 1984); *United States* v. *Piteo,* 726 F. 2d 50 (CA 2, 1985); and *United States* v. *Campbell,* 706 F. 2d 1138 (CA 11, 1983).

These cited federal authorities are in direct conflict with state decisions from Pennsylvania, Rhode Island and New York.

In *Commonwealth* v. *Brown,* Pa. Super., 364 A. 2d 330, 332 (1976), it was held that ". . . a delay caused by a co-defendant and not agreed to by a defendant cannot be charged to the defendant." Similarly, the same court in *Commonwealth* v. *Hagen,* Pa. Super., 364 A. 2d 328 (1976), reversed a judgment of conviction where there was no evidence that appellant made any statements or acted in any other manner that would indicate that he approved of the delays occasioned by his co-defendants. See also, *Commonwealth* v. *Relly,* Pa. Super., 369 A. 2d 879 (1976) (holding that the prosecution must move for a severance when faced with delays caused by a co-defendant); *Commonwealth* v. *Thomas,* Pa. Super., 404 A. 2d 1340 (1979) (holding that the record must affirmatively show that defendant approved of or contributed to the delays); and *Commonwealth* v. *Hamm,* Pa. Super., 473 A. 2d 128 (1984) (holding that delays caused by co-defendants may constitute sufficient grounds only for a continuance of trial).

In *State* v. *Anthony,* R. I., 448 A. 2d 744 (1982), the court dealt with a factual setting remarkably similar to the one in the case at bar. Anthony and one DePari

had been indicted jointly. Anthony caused most of the delays which were chiefly responsible for DePari's belated trial. The court correctly concluded that the delays occasioned by Anthony ". . . are not attributable to DePari merely as a co-defendant in the absence of some evidence that he acquiesced in or contributed to these delays." At p. 748.

Finally, in *People* v. *Brauman,* 393 N. Y. S. 2d 266 (1976), the court concluded that only absent an objection may adjournments caused by one co-defendant be chargeable to another co-defendant.

In the case at bar, Petitioner's Speedy Trial clock ran past the due date of seventy (70) days by sole reason of his co-defendant's actions. Eight (8) months of the delay was occasioned by the trial judge's taking under advisement the plea agreement of one of the co-defendants.

To be sure, federal law clashes with state law on this extremely important issue. This Court should, therefore, resolve the demonstrated conflict by issuing the Writ of Certiorari to review the Decision below.

II. The Trial Court Should Have Permitted Petitioner to Cross-Examine the Government's Chief Witness as to a Specific Instance of Conduct Bearing on the Witness' Credibility.

It is clear that the Sixth Amendment guarantees each defendant the right to effective cross-examination of the witnesses against him. In order for cross-examination to be "effective" in the Sixth Amendment sense, defense counsel must be permitted to expose the facts from which the fact-finder can draw inferences

relating to the reliability of the witness. *Davis* v. *Alaska,* 415 U. S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Ordinarily, defense counsel should be permitted wide latitude in the scope of cross-examination of government witnesses about matters relevant to credibility or bias. *United States* v. *Mansaw,* 714 F. 2d 785 (1983). See generally, 3 D. Louisell & C. Mueller, *Federal Evidence,* Sections 307, 341 (1979).

In the instant case, the government's entire case against Petitioner rested primarily on the testimony of a cocaine dealer who conveniently turned informer after his arrest on possession of a substantial quantity of drugs. It was established at trial that the informer, in return for his testimony, received a probated misdemeanor sentence for the narcotic violation and was placed in the government's Witness Protection Program after having been awarded approximately $5,000.00 in cash from the government. This witness testified as to highly incriminating details of the case, all of which Petitioner himself denied. It was the informer's testimony that provided the necessary connection between the conspiracy and Petitioner's alleged role in it.

The credibility of the informant, therefore, was the main thrust of Petitioner's defense. Clearly, but for the informer's testimony, the government could not have carried the day at trial.

Prior to trial, defense counsel obtained a tape recording of a state Grand Jury proceeding where the informant had testified perjuriously. On cross-ex-

amination defense counsel attempted an inquiry into this specific instance, but the trial court refused to permit it under Rule 608(b), Federal Rules of Evidence.

Under Rule 608(b), the court may allow impeachment of a witness by cross-examination concerning specific instances of conduct if the conduct relates to the witness' character for truthfulness or untruthfulness. *United States* v. *Dennis,* 625 F. 2d 782, 798 (CA 8, 1980). The Rule would permit inquiry into the specific acts if those acts related to *crimen falsi,* e.g., perjury, subornation of perjury, false statement, embezzlement, false pretenses. *United States* v. *Kirt,* 496 F. 2d 947 (CA 8, 1974).

Wigmore views false swearing as relevant to truthfulness. 3 Wigmore, *Evidence,* Sec. 982 at 550 (3 ed. 1940); McCormick agrees. McCormick, *Evidence,* Sec. 42 at 87 (1954); so does Dean Ladd. Ladd, "Credibility Tests—Current Trends", 89 U. Pa. L. Rev. 166, 180 (1940).

It is plain, then, that defense counsel should have been allowed, under Rule 608(b), to impeach the government's witness with the perjury evidence. This is particularly so when it is considered that the informer was by far the government's most valuable witneess in its case against the Petitioner. As already stated, the government could not have proven its case without the informant.[1] Given the totality of the circumstances

[1]The Court of Appeals ruled otherwise, stating ". . . although Lynch's [the informant's] testimony was important, it was not

(Continued on next page.)

of this case, the Petitioner's Sixth Amendment right to effective cross-examination was violated and the error can in no wise be deemed harmless.

CONCLUSION

The Petitioner submits that the questions and conflicts of decisions presented by this Petition are of such general importance to the proper administration of justice that this Court should accept jurisdiction and issue a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

C. FRED PARTIN
Attorney-at-Law
1926 Kentucky Home Life Building
239 S. Fifth Street
Louisville, Kentucky 40202
(502) 589-5051

Counsel for Petitioner,
Kenneth M. Zoeller

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critical. The jury could have found Zoeller guilty of each of the Counts on which he was convicted on the basis of Malone's testimony alone." However, this was in error. Count 3 of the indictment charged Petitioner with unlawfully using a firearm during the commission of a felony [Title 18, United States Code, Section 924(c)(1)]. The sole testimony convicting Petitioner on this Count was from the informer Lynch. Petitioner was arrested three (3) days later and had no firearm on or near his person. Malone never testified on this issue. It was solely the informant Lynch's testimony that implicated Petitioner on this Count.

APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominenty displayed if this decision is reproduced.

No. 84-5847

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

KENNETH M. ZOELLER, - - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Western District of Kentucky.

OPINION — Filed June 25, 1985

Before: MERRITT and KENNEDY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

KENNEDY, Circuit Judge. Zoeller appeals his conviction for conspiracy to distribute cocaine, 21 U.S.C. § 846(a)(1), possession with intent to distribute cocaine, 21 U.S.C. § 841, and use of a firearm to commit a felony, 18 U.S.C. § 924 (c)(1). He was indicted with two co-defendants, William Fields and James Keith. Fields entered a guilty plea frior to trial. Keith was tried with Zoeller and acquitted on all counts. Appellant contends that the District Court erred in denying his motion to dismiss the indictment pursuant to the Speedy Trial Act, 18 U.S.C. § 3161; and that, alternatively, he should be granted a new trial because the District Court erroneously excluded evidence of a prior inconsistent statement of the government's key witness.

I.

On or about August 16, 1983, Michael Lynch, a Drug Enforcement Agency (DEA) informant, purportedly seeking a supplier of cocaine, met Fields. Lynch testified as follows: at their initial contact, Fields showed Lynch four ounces of cocaine wrapped in a towel and told Lynch that he could supply Lynch with all the cocaine Lynch needed; a meeting was then arranged, at which Fields introduced Lynch to Zoeller, and at which Zoeller agreed to front Lynch one ounce of cocaine and assured Lynch that he had an unlimited supply of cocaine; the next day, Fields delivered the ounce of cocaine to Lynch at Lynch's house, and while Fields was there, a man named James Smith arrived and purchased half an ounce of cocaine from Fields with a personal check made out to cash, Lynch assuring Fields that as far as he knew Smith's check would be good. At some point Fields gave or negotiated the check to Zoeller, to whom the check was twice returned for insufficient funds.

DEA Agent James Malone then instructed Lynch to set up another meeting with Zoeller and Fields, for the purpose of attempting to discover their source of supply. On August 23, Lynch and Malone met Zoeller and Fields at a motel lounge. Malone was introduced as Lynch's brother-in-law. Malone testified about that meeting as follows: he complained of the quality of the ounce of cocaine supplied to Lynch; Zoeller stated that all of the cocaine he sold was of superb quality and that he didn't know why the cocaine supplied to Lynch was not; Malone agreed to pay the $2200 owed by Lynch; Fields brought up the fact that Smith's check had bounced, and stated he had access to any quantity of cocaine required by Malone; Zoeller and Fields then left the lounge, indicating that they would return shortly; after they returned, Fields asked if Malone was going to pay the $2200, to which Malone replied that

he would but that Fields and Zoeller would have to come out to his car; the four of them then statrted to leave the lounge, Malone, Lynch and Fields entering the men's room and Zoeller going directly outside; the three of them left the restroom to go outside, Malone walking in front and Fields and Lynch somewhat behind; Zoeller pulled his car between them, Fields ordering Lynch into the car at gunpoint and telling Malone they would be back.

Lynch testified that Zoeller and Fields warned him that if he was setting them up he would be killed, and that Fields pointed his gun at Lynch's head and Zoeller had a gun in his lap. Malone testified that when Zoeller and Fields returned to the lounge parking lot with Lynch, Fields pointed his gun at Malone and told him that he would blow Malone's brains out if Malone didn't pay him the $2200. An off-duty policeman observing Fields holding Malone at gunpoint, arrested Fields. Zoeller drove off, and was arrested three days later.

Zoeller testified that his sole reason for attending the August 23 meeting was to obtain payment on the Smith's NSF check from Lynch; that he had nothing to do with distributing drugs; that he had no weapon in his car when Lynch was present; and that the only threat he made against Lynch concerned paying him the amount of the worthless check. Zoeller also testified that he had a severe hearing loss in one ear, which impaired his ability to hear the conversations between Fields, Malone and Lynch in the lounge and parking lot, and between Fields and Lynch in his car.

II.

The basic requirement of the Speedy Trial Act is that defendants be tried within seventy days from the commencement of prosecution. 18 U.S.C. § 3161(c). If this time

limit is exceeded, the Act requires on the motion of the defendant that the charges be dismissed. 18 U.S.C. § 3162 (a)(2). However, the Act prescribes numerous exceptions whereby time may be excluded from the running of the "Speedy Trial Clock." 18 U.S.C. § 3161(h). In particular, subsection (h)(1)(f) provides that the period from filing to disposition of pretrial motions shall be excludable. Where multiple defendants are charged on an indictment and no motion for severance has been granted, there is only one "Speedy Trial Clock" for all defendants. A delay attributable to one defendant is chargeable to all. 18 U.S.C. § 3161(h)(7); *see e.g., United States* v. *Dennis,* 737 F. 2d 617, 620-21 (7th Cir.), *cert. denied,* 105 S. Ct. 215 (1984); *United States* v. *Piteo,* 726 F. 2d 50, 52 (2d Cir.), *cert. denied,* 104 S. Ct. 2390 (1984); *United States* v. *Campbell,* 706 F. 2d 1138, 1141 (11th Cir. 1983).

Zoeller, Fields and Keith were indicted on September 8, 1983. Fields entered his guilty plea on January 20, 1984. On February 10, 1984, the District Court ordered that the cases against Fields "be passed for the Court's acceptance of the plea agreement and sentencing pending trial of the co-defendants," and "that the time between January 20, 1984, . . . and the date upon which the court accepts or rejects the agreement . . . and sentencing, shall be excluded under . . . Section 3161(h)(1)(I). . . ." Zoeller and Keith were tried on September 12 and 13, 1984. Appellant calculates that if no excludable time were allowed, he and his co-defendants would have been entitled to trial no later than November 17, 1983. He then states that excludable time due to pretrial motions filed by the respective defendants extended this date to November 17 for himself and Keith, and January 20, 1984, for Fields. Therefore, he contends, under § 3161(h)(7), Fields' January 20, 1984 trial date was the operative limit for all defendants.

Appellant has plainly misconstrued the effect of §3161 (h)(7). It does not create three separate "Speedy Trial clocks," of which the latest applies to all co-defendants; as stated above, it creates a single clock, against which excludable time attributable to a single co-defendant is chargeable against all. From September 12 to December 19, the trial court was continually acting upon one or the other of various defendants' motions. This entire period constitutes excludable time for all co-defendants. Therefore, apart from any other periods prior to January 20, that may have been excludable,[1] at *most* only thirty-five includable days elapsed between September 8 and January 20.

Zoeller also contends that the District Court, by its February 10 order, could not retroactively exclude the time from January 20, when Fields entered his guilty plea, through February 10. The exclusions under the Act, except the interests of justice exclusion, however, are automatic; it is necessary neither that the government file a motion to exclude time nor that the court so order. *United States* v. *Richmond*, 735 F. 2d 208, 212-13 (6th Cir. 1984). Subsection (h)(1)(I) provides that delay resulting from the consideration by the court of a proposed plea agreement is excludable, which under subsection (h)(7) would be chargeable to all defendants even if only attributable to one. Appellant's argument that when Fields entered his plea of guilty he was "effectively severed" from appellant and Keith is meritless. By its terms, subsection (h)(7) applies where "no motion for severance has been granted." No motion for severance was made, let alone granted, in this case. Even if a motion for severance had been made, whether to grant the motion would rest within the discretion

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[1] *E.g.*, from January 9—when Zoeller orally requested and was granted a continuance of the trial date from January 23 to January 25—to January 25.

of the trial court. *See, e.g., United States* v. *Davis,* 582 F. 2d 947, 952 (5th Cir. 1978) (no showing of prejudice from trial court's decision not to sever defendants from co-defendant who pled guilty before trial). Most of the time after January 20 was specifically excluded or excludable for reasons other than the pendency of Fields' guilty plea. Zoeller does not and cannot argue that his trial was unreasonably delayed because delay attributable solely to Fields was applied to him as well. The District Court did not err in refusing Zoeller's motion to dismiss the indictment against him pursuant to the Speedy Trial Act.

III.

Prior to becoming a DEA informant, Lynch was arrested and charged in state court with a drug-related offense involving possession of a large quantity of cocaine. The state indictment was ultimately dismissed and a federal misdemeanor information filed against Lynch, which resulted in a one year probated sentence.

During cross-examination, defense counsel asked Lynch whether he had ever been involved in any "con games" prior to his becoming involved in drug dealing. Lynch admitted he had. Defense counsel then asked what kind of con game, to which Lynch replied, "With Billy Fields." Government counsel then objected, and the court asked defense counsel where he was going with this line of questioning. Defense counsel replied:

> Mr. Partin: I'm going to impeach him, if the Court will permit me, from prior sworn testimony to what he's previously admitted, illegal acts he's committed with a codefendant, coconspirator in this case.
>
> By the Court: Well, that's—that's just not admissible, Mr. Partin.

> Mr. Partin: Well, if he testified under oath, Your Honor, that he'd never done anything illegal and in fact he has on a con game in duping people across the country out of money and things like that. That's what I intend to show.

The judge then sustained the objection, permitting defense counsel to put an avowal on the record. It is clear from the record of the avowal that the judge understood from the above statements of counsel, as well he could have, that it was counsel's intent to impeach Lynch by cross-examining him on the details of the con game in which he had admitted participating. *See* Fed. R. Evid. 608(b) (impeachment of witness on cross-examination by inquiry into "[s]pecific instances of conduct, . . . other than conviction of crime . . . , if probative of . . . untruthfulness"). Nor does Zoeller appeal on this basis. Rather, it was defense counsel's intent to impeach Lynch by prior inconsistent statement, by introducing a tape of Lynch's sworn testimony in an unrelated state grand jury proceeding, in which Lynch stated that prior to his involvement with drugs he had never done anything illegal. After observing that by this line of questioning defense counsel was going "far afield," the judge again sustained the government's objection.

Even though the judge sustained the objection, government counsel then requested that the Court specifically rule that the court was exercising its discretion under Fed. R. Evid. 608(b) in excluding the proffered testimony, Defense counsel replied that "[w]e weren't pursuant to 608(b):" The judge, however, did then rule that "under 608, I'm going to exclude it." Although defense counsel never cited the rule for prior inconsistent statement, it is clear that he intended that his proffer would be made under Fed. R. Evid. 613.

To the extent defense counsel was permitted to elicit an admission from Lynch that he had participated in a "con game," this testimony was not relevant to any substantive issue respecting the charges against Zoeller, but was offered solely for the purpose of attacking Lynch's credibility under rule 608(b), as a "prior bad act" probative of untruthfulness. Defense Counsel sought to introduce evidence that Lynch was unworthy of being believed because of his participation in the "con game" as a bad act, then to introduce evidence that he had lied in stating that he had never engaged in illegal activity prior to his involvement with drugs (the grand jury testimony), as a prior inconsistent statement. Although Lynch's grand jury testimony was logically inconsistent with his admission that he had participated in a "con game," the grand jury testimony was not offered for the purpose of showing that the admission was untruthful. Rather, its relevance in terms of Lynch's credibility was as a separate "bar act" probative of untruthfulness—lying under oath to a grand jury. Even if there is some advantage in proffering the latter evidence under rule 613 rather than 608(b),[2] it would be bootstrap-

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[2]While Rule 608(b) specifically states that specific instances of conduct probative of untruthfulness may be inquired into "in the discretion of the court," and no such phrase is included in rule 613, rule 613 is subject to rules 403 and 611. 3 D. Louisell & C. Mueller, Federal Evidence § 356, at 554-55 (1979). Under the rule 403, it is within the trial court's discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations or undue delay, waste of time, or needless presentation of cumulative evidence." *See In re Beverly Hills Fire Litigation*, 695 F. 2d 207, 217-18 (6th Cir. 1982), *cert. denied sub nom. Bryant Elec. Co.* v. *Kiser*, 461 U. S. 929 (1983). Under rule 611, the court has broad discretion in limiting the scope of cross-examination so as to make effective the ascertainment of

(Continued on next page.)

ping to permit testimony, relevant only for impeachment purposes under rule 608(b), to serve as the basis for introducing similarly relevant testimony on an unrelated matter under rule 613, rather than rule 608(b) as well. *Cf. United States* v. *Barnes,* 622 F. 2d 107, 110 (5th Cir. 1980) ("[T]he defense could not inquire about her previous convictions in violation of Rule 609(a)(2) just to set her up for impeachment by a prior inconsistent statement,")[3] The trial court did not err in treating the proffered testimony under rule 608(b) rather than rule 613.

Nor did the trial court abuse its discretion in refusing to permit the proffered testimony under rule 608(b). Although the only specific statement of the judge forming the basis for his ruling was that the testimony was "far afield," it is plain from the avowal that the proffered testi-

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the truth, avoid needless consumption of time, and protect witnesses from harassment of undue embarrassment, "and a judge's ruling will not be the basis for reversal of a criminal conviction unless a defendant's substantial rights are affected." *United States* v. *Terry,* 729 F. 2d 1063, 1067 (6th Cir. 1984) (citations omitted). Although prior inconsistent statements may be proved by extrinsic evidence while prior bad acts may not, this difference is not relevant to the threshold question of admissibility.

[3]In *Barnes,* one of the government's principal witnesses admitted at a pretrial hearing that she had told the prosecutor and an FBI agent prior to trial that she had never been convicted of a crime when in fact she had two misdemeanor shoplifting convictions. The court held that these convictions were not admissible under Fed. R. Evid. 609(a)(2), because the crimes did not involve dishonesty or false statement. 622 F. 2d at 109-10. The court then rejected appellant's argument that the trial court erred in refusing to allow cross-examination of the witness concerning her untrue statement to the prosecutor and FBI agent. In doing so, it considered the admissibility of such testimony under *both* rule 608(b) *and* rule 613.

mony would have been both time-consuming and potentially confusing to the jury. *See* note 2 *supra.*

Appellant argues that Lynch's credibility "was crucial to the determination of the case," since "MR. LYNCH's testimony was refuted by MR. ZOELLER on virtually every point," and therefore exclusion of the proffered evidence was prejudicial. First, Lynch's credibility was thoroughly attacked. Testimony reflecting on Lynch's credibility, motives and bias included details of Lynch's drug-related arrest and conviction, his inclusion in the federal witness protection and payments made to him as an informant, elicited during both direct and cross-examination. During cross-examination of Lynch, defense counsel established that Lynch had carried a gun during the time that he was involved in dealing drugs, that he had used cocaine while cooperating with the DEA, and elicited a denial that the drug transaction with Smith involving the $1200 check had been between Lynch and Smith alone. Smith subsequently testified to the contrary, claiming that he had told the DEA a different story at Lynch's request. Lynch also denied recalling ever having marijuana plants in the back of a truck he was driving. Lynch's uncle then testified to the contrary. Lynch's uncle also testified that Lynch was a "fast talker," describing one of Lynch's businesses as a "scheme" and another as a "hustle." Thus, the jury had sufficient information upon which to make a discriminating appraisal of Lynchs credibility without the proffered evidence. *See United States* v. *LaRiche,* 549 F. 2d 1088, 1097 (6th Cir.), *cert. denied,* 430 U. S. 987 (1977).

Second, although Lynch's testimony was important, it was not critical. The jury could have found Zoeller guilty of each of the counts on which he was convicted on the basis of Malone's testimony alone. The conspiracy and possession with intent to distribute counts are supported by Malone's testimony that appellant stated at the August

23 meeting that all of the cocaine sold by the appellant was of superb quantity and he didn't know why that sold to Lynch wasn't. Although only Lynch testified that appellant had a gun in his lap when Lynch, Fields and appellant left the meeting in appellant's car, Malone testified that Fields ordered Lynch into the car at gunpoint, and it is undisputed that Fields ordered Malone at gunpoint to pay him the $2200 after the car returned to the parking lot. Zoeller was charged on the weapons count under 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2, the general aiding and abetting section. The combined effect of these sections is that Fields' gun became Zoeller's as a matter of law. *See Busic v. United States*, 446 U. S. 398, 410-11 (1980); *United States v. James*, 528 F. 2d 999, 1015 (5th Cir. 1976). Appellant's substantial rights were not affected when the trial court refused to permit defense counsel to cross-examine Lynch on his state grand jury testimony.

The judgment of the District Court is affirmed.

Issued as Mandate: August 19, 1985

Costs: None

No. 84-5847

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

KENNETH M. ZOELLER, - - - *Defendant-Appellant.*

ORDER — Filed August 9, 1985

Before: MERRITT *and* KENNEDY, Circuit Judges; and PHILLIPS,* Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by appellant, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

(s) John Hehman
John Hehman, Clerk

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*Honorable Harry Phillips participated in oral argument but due to his death on August 2, 1985 took no part in the order.